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No. 83-685

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MARINE CORPS EXCHANGE;
COMMERCIAL UNION INSURANCE
COMPANY, PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR, ET AL

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ADDITIONAL QUESTIONS PRESENTED

In addition to the questions presented by Petitioners, Marine Corps Exchange and its workers' compensation insurance carrier, Commercial Union Insurance Company, the question of reasonable attorney fees for Respondent Elton Morgan under 928 (a) of the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. 928 (a) is in issue ir the instant matter.

1. Whether, assuming the decision below is upheld, the Respondent, Elton Morgan, is entitled to a reasonable attorney fee for representation before this Court, under 928 (a).

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RESPONSE TO PETITION
FOR WRIT OF CERTIORARI
TO THE UNITED STATES
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THE NINTH CIRCUIT

Elton Morgan, injured employee, responds to the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

JURISDICTION

The opinion of the Court of Appeals was entered on August 25, 1983. The jurisdiction of this Court is involved under 28 U.S.C. 1254 (1). The jurisdiction of the Court of Appeals was invoked under 33 U.S.C. 921 (c).

ADDITIONAL STATUTORY PROVISIONS INVOLVED

1. 928 (a) of the Longshoremen's and Harbor Workers' Compensation Act, as amended effective November 26, 1972, 33 U.S.C. 928 (a) provides in part:

> " 928 (a) ... there shall be awarded, in addition to the the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or Court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

STATEMENT OF THE CASE

The issues presented in this matter arise out of an industrial back injury suffered by Elton Morgan on August 27, 1976. This claim arose under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq., as extended by the Nonappropriated Funds Instrumentalities Act, 5 U.S.C. 2105, 8171-8173.

Trial was held before a Administrative Law Judge (hereinafter ALJ) on August 24, 1977. Trial involved a consolidated claim by Morgan against the Marine Corps Exchange and its insurance carriers, Fireman's Fund Insurance Company, (hereinafter Fireman's) and Commercial Union Insurance Company (hereinafter Commercial).

Morgan suffered an injury to his lower back, on April 21, 1969, in the course and scope of his employment for Marine Corp. Exchange. The injury resulted in a lumbar laminectomy being performed on October 1, 1971. Fireman's voluntarily provided medical treatment and temporary total disability. Fireman's was the insurance carrier at risk at the time of injury.

Morgan returned to work in December, 1971, however, Morgan continued to have back complaints and continued to receive medical treatment. Fireman's paid for all medical treatment.

Morgan had to limit his physical activity and spent three to four hours of each work day lying on a lounge, provided by his employer, for relief of pain. Respondent did perform the administrative portion of his work, including directing employees, from the lounge.

On August 27, 1976, Morgan tried to open a sliding door while at work. He suffered severe pain, and has not returned to work since the time of this incident. Morgan then sought compensation for permanent total disability based on this incident against both Commercial and Fireman's.

ALJ issued his Decision Order after trial on February 9, 1978. ALJ found that the incident of August 27, 1976 was an injury within the meaning of the act. Further, he found that Morgan was permanently and totally disabled. ALJ determined that the August 24, 1976 injury was not the sole cause of Morgan's disability, "but just the final event in a chain of major and minor incidents

leading up to the respondent's present absolute inability to perform even limited physical tasks required of him in his last employment".

The ALJ inposed liability equally upon Fireman's and upon Commercial, and also concluded the section 8 (f) of the act (33 U.S.C. 908 (f) applied to limit Commercial's liability to 104 weeks. Benefits were also awarded to Morgan from the Special Fund established under 33 U.S.C. Section 908 (f).

All parties appealed from that decision. The Benefits Review Board issued a decision on April 30, 1979. (Morgan v Marine Corp. Exchange, 10 BRDS, 442). The decision upheld the Decision and Order of the ALJ in part, and remanded in part. The Board affirmed the finding that Morgan was not permanently and totally disabled as a result of the first injury alone, but that the second employment-related incident was a separate injury which contributed to Morgan's total disability. Remand was for determination of Morgan's wage

earning capacity, prior to the injury covered by Commercial.

In his decision after remand, on August 2, 1979, ALJ determined that respondent's wage earning capacity had been reduced by fifty percent after the injury of 1969. All parties appealed from this decision.

Benefits Review Board affirmed the Decision and Order after remand. Fireman's was held liable to pay Morgan $58.66 per week. Petitioner was held liable to pay Morgan $196.23 per week for 104 weeks. Thereafter, Morgan was awarded permanent total disability from the Special Fund.

Commercial then sought review by the Court Appeals for the Ninth Circuit. The Court of Appeals affirmed by Memorandum Decision dated August 25, 1983. This Petition for Certiorari was then filed.

SUMMARY ARGUMENT

At the outset of the questions presented by Commercial, they note that they dispute

the "average weekly wage" of Morgan at the time of the second injury. This is so even though there is no factual dispute below that Morgan was earning $294.38 per week at such time. In attempting to so raise this issue, even though it is not addressed fully in Commercial's main presentation, Commercial attempts to reargue a factual consideration determined by the ALJ below. Such a finding is to be accorded great weight, and should not be disturbed by a higher court, when, as here, it is supported by substantial evidence.

The main contentions of Commercial is first, that the $294.38 per week figure does not fairly represent "post-injury wage-earning capacity." As noted above, the "average weekly wage" disputed by Commercial, was in fact clearly determined by ALJ below to be the weekly wage of Morgan. As such there is no basis upon which Commercial can claim that such determination of "average weekly wage" or "earning capacity" was

erroneous. On that basis, this issue is foreclosed by the decisions below.

Commercial's second contention, that the decisions below erroneously "pyramided" the awards to Morgan, is based in part upon what Commercial perceives to be an erroneous determination of "earning capacity" and adjustment of "average weekly wage". To the extent that this contention is based upon an argument for reconsideration of findings of fact, it is also foreclosed by the decision below. To the extent that the decision below was based upon uncontested facts, it must be viewed as properly apportioning, the recovery of Morgan between the two injuries and making allowances for the difference in the "average weekly wage" or "earning capacity" of respondent of the different times of the different injuries.

Commercial's third contention is based upon the assumption that the decision of the Court below is in conflict with the decision of the Circuit Court for the District of

Columbia in the case of Hastings v. Earth Sattelite Corp., 628 F. 2d 85, 14 BRBS 345, cert. denied 101 S. Ct. 281 (1980). This contention, however, is largely based upon Commercial's assertion that the Court below erroneously applied or interpreted the decision of the District of Columbia Circuit. In that sense, Commercial does not advance the argument that there is "conflict" between the circuits, but merely a misreading of the law by the Court below. This does not present sufficient grounds upon which this court should grant a Writ of Certiorari. In addition, Morgan contends that the decision of the District of Columbia Circuit was not misinterpreted or misapplied by the Circuit Court below.

Commercial's last contention, that there was error and departure from accepted and usual proceedings and an abuse of judicial descretion is not supported by the record, for it is based upon the assumption that the Circuit Court below found facts which were

not in the record. Morgan asserts that the record amply supports the conclusions of the Circuit Court below and its reading of the factual proceedings.

PRESENTATION

Commercial first claims error in that the Circuit Court approved a finding that respondent's "wage-earning capacity" was equivalent of the respondent's "average weekly wage" of $294.38 per week. In doing so, Commercial places itself in the middle of a contradiction raised by its own argument. First, it attempts to contend that the respondent is unable to work in the open labor market because of his "profound disability." On the other hand, Commercial concedes that at the time of the second injury in August of 1976, respondent was earning a wage of $294.38 per week. Initially, Commercial seems to contend that Morgan would not be entitled to any compensation, for any injury occurring in

1976. To the extent that Commercial contends that there was no wage earned by Morgan at the time of the second injury, it is foreclosed by the obvious finding of the ALJ, as relied upon by both Benefits Review Board and the Circuit Court, that respondent did in fact receive this wage.

Such a finding, as a finding of fact, is to be accorded substantial weight on review. Todd Shipyards Corp. v. Donovan, 300 F. 2d 741 (5th Circuit, 1962): Banks v. Chicago Grain Trimmers, 390 U.S. 459 (1968). As noted as in Hullinghorst Industries, Inc. v. Carroll, 650 F. 2d 750, 759 (1981):

> ... Our review of the Board's Determination is limited to reviewing for legal error and to ascertaining that the Board adhered to the statutory standard in its own review of the facts. (Citation). And, in a case providing facts remarkably similar to those in a present case, Director, etc. v. Brandt Airflex Corp., 645 F. 2d 1053, 1057 (1981), "In any event, the standard judicial review precludes any serious dispute of the ALJ's findings, entrenched, as they are, by the Board's affirmants." (Citing interalia Banks v. Chicago Grain).

Having first attempted to argue that Morgan had no "wage-earning capacity" based upon his "profounded disability", Commercial next attempts to argue that the decision of the ALJ on remand, that "...claimant's earnings after his April 21, 1969 injury did not fairly represent post-injury wage-earning capacity, "implies that there was no basis for the determination that the petitioner had received the fifty percent diminution in wage earning capacity in 1969. To do so, however, is in effect to ignore the reasoning of the Circuit Court.

The Circuit Court below noted that there is no contradiction between the finding on the one hand that respondent had a 50% reduction in wage-earning capacity in 1969, yet had a wage earning capacity equivalent to his full wages in 1976. As the Court noted:

> "The 1969 injury produced a 50% reduction in Morgan's earning capacity <u>at that time</u>. By 1976 however, Morgan had received several raises. His duties had changed. His services may well become more valuable despite his injury. Thus, a new determination

> of earning capacity was required in order to compute the benefits payable for the 1976 injury."

In other words, the two injuries in this case, separated by a period of seven years, are sufficiently separated in order to determine that what constituted a diminution in wage-earning capacity at one time did not carry over forever into the future.

This, as the main issue determined by the Circuit Court below, should not be disturbed on review. The Circuit Court reasonably concluded that there was no contradiction between the two findings, one in 1969 and one in 1976, relating to the "wage-earning capacity" of Morgan. As Commercial concedes, Section 908 (h) resolves this dilemma, by providing that the wage-earning capacity of a injured employee, in circumstances such as that presented in this case, has to be resolved by looking at the "actual earnings if such actual earnings fairly and reasonably represent (claimant's) wage-earning capacity ...."

The next two issues presented by Commercial, although addressed separately at the outset of Morgan's brief, are mainly discussed in tandem, and will so be addressed by Morgan. In essence, Commercial contends that it was error for the Courts below to "pyramid" the two awards of permanent disability and partial disability in 1969 and 1976, in an erroneous application of the case of Hastings v. Earth Sattelite Corp., 628 F. 2d 85, 14 BRBS 345, Cert. denied, 101 S. Ct. 281 (1980). There are a number of reasons why this court should not apply this reasoning.

In the first place, Hastings is distinguishable from the present case on its facts. In the Hastings case, there was a dispute regarding how much of that claimant's initially higher wage was to be applied in determining his present "wage-earning capacity". In the present case, by contrast, not only is there no dispute as to what the actual wages of Morgan were, at the time of

the second injury, those wages were actually higher than at the time of the first injury, presenting precisely the opposite situation of that in Hastings. It is futile for Commercial to contend that the $294.00 figure is "artifically high and unrealistic." As noted supra, the respondent's wage at the time of the second injury was determined beyond question by the trier of fact below. It was thus not only not unreasonable for the Court to apply this wage, but it would have contravened explicit finding of fact by ALJ.

Hence, the Circuit Court in this case easily disposed of the problem present in the Hastings case, even though it does not mention the Hastings case by name in its decision. However, the Court points out that Morgan was was earning more at the time of the 1976 injury, and that it was reasonable to utilize that figure as his wage earning capacity even though it was greater than the diminished wage earning capacity in 1969.

Certainly, one cannot reasonably contend

that by merely distinguishing the facts of the case before it, the Circuit Court has somehow created a conflict between the Circuit Courts and the statutory interpretation of the Act in this case. It would be unreasonable, in fact, to grant the Writ in this case solely on that basis, where the different conclusions are merely the result of different factual situations.

Commercial also cites Rupert v. Todd Shipyard Corp., 239 F. 2d 273 (9th Cir. 1956) as authority that permanent partial and permanent total disability cannot be "equally pyramided." Morgan contends that reliance upon this case is misplaced. Rupert involved an award for permanent partial disability and an award for cosmetic disfigurement arising out of the same accident. The court in Hastings, supra, had held that a permanent partial award for an initial injury can run concurrently with an award for permanent total disability, which is much closer to the

situation presented in the instant case. Thus, although arguing that the two cases present a conflict between the circuits, the case cited by Commercial as stating the law in the Ninth Circuit is also distinguishable from the present case. Whereas Hastings, although distinguishable from the present case on its facts, does provide support for the Benefits Review Board's decision with respect to its finding as to the law in the situation involving separate injuries.

The final issue raised in petitioner's brief, that the Court of Appeals in its decision "engages in speculation as to facts not contained in the record" is a rather elusive discussion presented in a single paragraph. Commercial does not suggest as to what facts the Court of Appeals "speculated", nor does it discuss what "indisputable findings of fact" the Court of Appeals disregarded. Under the circumstances, this minimal discussion does not provide sufficient grounds upon which this court can

consider this issue. Therefore, this issue should be disregarded by this Honorable Court.

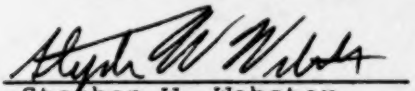
Finally, Morgan respectfully requests that this Honorable Court award him attorneys fees for the work involved in this response, as provided in 33 U.S.C. §928 (a).

CONCLUSION

Commercial is foreclosed from relitigating issues of the fact which were finally determined by the Court below, and affirmed twice on prior appeals. The issues of law, contrary to Commercial's contentions do not present any "conflict" between the decisions of any of the circuits in the federal system. Rather, these are mere disputes of fact, which are easily resolved by looking at the individual cases cited. Accordingly, the Petition for Writ of Certiorari should be denied, and Elton Morgan should be awarded attorney fees.

Dated: December 20, 1983

Respectfully submitted,
O'LENO & WEBSTER

by 

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